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## ITC reviews Apple, Samsung decision

### Controversial ban looms if patent infringement found with iPad, iPhone

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The U.S. International Trade Commission (ITC) on Tuesday said it will take a second look at one of its judge's decisions that found Apple Inc. did not violate four Samsung Electronics patents.

The ITC's decision to review a judge's findings does not break any new ground, but the patents involved in the case just might.

Lawyers and law professors said the type of patents involved in the Apple and Samsung dispute — called “standard essential patents” — present a problem that may prevent the ITC from doling out its typical punishment to patent infringers, an import ban on their products.

“The idea of litigating over a standard essential patent is somewhat new,” said David L. Newman, an intellectual property partner at Arnstein & Lehr LLP.

“And part of the rules of the ITC ... take on a new light when dealing with standard-essential patents.”

In September, an ITC administrative law judge ruled Apple did not violate four Samsung patents, representing one battle amid a patent war between the two smartphone makers. Two of the standard-essential patents at issue in the ITC case cover basic parts of 3G wireless technology and transmitting high-speed data.

ITC procedure allows its six-member panel of politically appointed individuals, called the commission, to review administrative law judges' decisions or pass them as they stand, lawyers said.

If the ITC review finds Apple guilty of infringement, Newman said it most likely would issue an exclusion order, which would ban Apple from importing its iPod, iPhone and iPad products.

“The whole purpose of the ITC is to provide exclusion orders,” he said. “That's why you go to the ITC.”

But other agencies, such as the Federal Trade Commission (FTC), do not want the ITC issuing exclusion orders on products that infringe on standard-essential patents.

“If the ITC ... bans products that infringe a (standard-essential patent), it effectively gives any company that owns one veto power over any product that uses that standard,” said Jonathan Masur, a professor at University of Chicago Law School.



David L. Newman

For instance, if the ITC allowed Samsung to block products like the iPhone or iPad on grounds that they infringe its patents on 3G technology, Samsung could exclude every 3G phone from the marketplace, Masur said.

“This is a much larger problem when it comes to standard-essential patents than it is with normal patents,” Masur said. “Under normal circumstances, a company could try to engineer around the patent ... but that is impossible” with standard-essential patents.

That power does not come without responsibility, however.

In return for receiving standard-essential status, the organizations that grant that status require the patent gets

licensed to other companies on “fair, reasonable and non-discriminatory” terms, Masur said.

Daryl Lim, an assistant professor at The John Marshall Law School, said that presents a separate problem: “What constitutes ‘reasonable and nondiscriminatory?’”

“It's a difficult issue and one that will not see resolution for some time regardless of how this review goes, precisely because it's almost a circular question,” Lim said.

Jordan A. Sigale, a partner at Loeb & Loeb LLP, said the legislation creating the ITC does not grant it the power to force licensing agreements or monetary damages on infringing parties, which the FTC may prefer.

In effect, he said the ITC cannot cave to pressure from the FTC not to issue exclusion orders when it finds a product that infringes a standard-essential patent.

“What do you do?” Sigale said. “In creating the ITC, Congress surely couldn't have intended to provide a forum for grievances, but leave the aggrieved parties with no remedy.”

One possible avenue, Sigale said, involves intervention from President Barack Obama, who can intervene in ITC decisions for policy reasons.

The ITC asked for public comment on the case, No. 337-794, no later than Dec. 3.